

Guidance on Determining a Violator's Ability to Pay a Civil Penalty

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460
December 16, 1986
OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

MEMORANDUM

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460

MARCH 6, 1979

MEMORANDUM

TO:Regional Administrators, Regions I-X

SUBJECT:Response to Energy Emergency; Implementation of
Section 110 (f) of the Clean Air Act, as amended

The Regional Offices should place highest priority on responding to any energy emergency which may arise and implementing EPA's responsibilities under Section 110 (f) of the Clean Air Act. Each Regional Administrator should take action to implement the guidance and recommendations set forth in the attached memorandum to me from Mr. Durning and Mr. Hawkins.

The Clean Air Act provides that I may disapprove any SIP suspension which I determine does not comply with Section 110(f) (2)(A) and (B) of the Clean Air Act. To assure that disapprovals of inappropriate suspensions are expedited, I hereby delegate to the Regional Administrators my authority under Section 110(f)(3) to disapprove suspensions issued by Governors. This authority may be exercised by the Regional Administrators only with the prior concurrence of the Assistant, Administrator for Enforcement and the Assistant Administrator for Air, Noise and Radiation. Concurrence from the Office of Enforcement and the Office of Air, Noise and Radiation should be requested and will be given by telephone through the designated EPA headquarters contact. I have designated Ms. Martha Prothro (FTS 755-2532) of the Division of Stationary Source Enforcement as the EPA Headquarters contact on all Section 110(f) matters. Ms. Prothro's alternate is Mr. Weldon Blake (FTS 755-2542). Each Regional Administrator should designate a regional contact and alternate and the contact should call Ms. Prothro as soon as possible.

In addition to this energy emergency plan to implement Section 110(f), we are initiating the development of an emergency plan to minimize adverse environmental effects which could result from a gasoline shortage. I will forward the gasoline plan with implementation guidance (if appropriate) in the future. Douglas M. Costle Attachment

cc: Department of Energy ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460 MARCH 6, 1979

SUBJECT:Energy Emergency Task Force; Implementation of
Section 110(f) of the Clean Air Act

FROM:Assistant Administrator for Enforcement Assistant Administrator for Air, Noise
and Radiation

TO:The Administrator

Summarized below is background information and proposed regional guidance on responding to an energy emergency under Section, 110(f). We are also initiating development of an emergency plan and implementation guidance (as appropriate) to minimize adverse environmental effects which could result from a gasoline shortage. We will forward the gasoline emergency plan to you in the future.

I. DOE/EPA Working Relations

The Department of Energy (DOE) has established an Energy Emergency Center to coordinate the federal government's response to crisis situations resulting from energy emergencies. Although the center was initiated under the impetus of the UMW strike, it would be the coordinating agent in any energy emergency. EPA has also established an ad hoc Energy Emergency Task Force to coordinate EPA's response to a crisis. EPA's offices of Enforcement, Air, Noise and Radiation, General Counsel, and federal activities are represented on the task force. EPA's contact with DOE's Energy Emergency Center is Mrs. Yvonne Allen, Director of the Center (202-252-5155). DOE's contact with EPA's Energy Emergency Task Force is ms. Martha Prothro (alternate: Mr. Weldon Blake) of the Division of Stationary Source Enforcement (DSSE - FTS 755-2523).

Ms. Allen has advised that coal supply information (quantity quality, and number of days of fuel supply) will be available from DOE: (1) weekly for utilities on a State wide basis (approximately 10-day-old data), (2) daily for specific utilities that DOE has determined to have a critically short coal supply; and (3) weekly for industrial coal burners on a Statewide basis. In addition, DOE can advise EPA of State actions to conserve and minimize consumption of the fuel in short supply and federal actions to provide for interconnections to assure that electrical power will be transferred to areas

most in need. Although this information is specific for coal, this guidance is to be used in any energy emergency. Coal availability information would be useful for sources presently burning oil or gas but which have coal burning capability in the event of a shortage of oil or gas.

DOE has established a formal day-to-day contact in Jack

Watson's office during energy emergencies in order to expedite the flow of information between EPA, DOE, and the White House. DOE and EPA have also agreed to maintain daily contact during such emergencies.

II. Petitions for Energy Emergency Declarations under Section 110(f) of the Clean Air Act

Section 110(f) provides that emergency SIPs suspension may be granted in accordance with the following:

(1) The owner or operator of fuel burning stationary Source applies to the state for relief.

(2) The Governor gives notice and opportunity for public hearing on the proposed petition.

(3) The Governor finds that:

(a) an emergency exists in the vicinity of the source involving high levels of unemployment or loss of necessary energy supplies for residential dwelling; and:

(b) such unemployment or loss can be totally or partially alleviated by an emergency suspension of State Implementation Plan requirements applicable to that source.

(4) The Governor petitions the President to declare that a national or regional energy emergency exists of such severity that:

(a) a temporary suspension of any part of the applicable implementation plan may be necessary; and

(b) other means of responding to the energy emergency may be inadequate.

(5) The President determines that a national or regional energy emergency exists. (This authority may not be redelegated.)

(6) The Governor may issue an emergency suspension to the source which may take effect immediately. Not more than one such suspension may be issued to a source based on the same set of circumstances or on the basis of the same emergency. Suspensions are limited in duration by any time limit the President places on his determination, and in any case may not exceed four months.

(7) EPA Administrator may review the Governor's suspension and disapprove it if he determines that it does not satisfy the criteria set forth in (3) above. If the EPA Administrator issues a disapproval order, he will specify therein the date on which the Governor's suspension shall no longer be effective.

(8) This procedure does not apply to a plan revision promulgated by the Administrator pursuant to Section 110(c) (such as for sulfur oxides in Ohio). The President, however, may grant up to a four month suspension of a State Implementation Plan promulgated by the Administrator if he makes the findings in (3) and (4) above.

Whenever a Governor petitions the President for a declaration of an energy emergency under Section 110(f), we suggest that EPA make the following recommendations:

A. Conservation measures:

It is essential that emphasis be placed on the need for energy conservation through means other than turning off pollution controls, which could involve violations of health-protective regulations. DOE has determined that there is no federal authority to mandate conservation measures and only a few States have such authority. Since Section 110(f) includes a provision for consideration of the adequacy of "other means" of responding to the emergency item #4(b) above), EPA should recommend to the President that his declaration of an energy emergency for purposes of Section 110(f) be conditioned on (1) Governor's requiring that sources covered by suspensions demonstrate they have implemented or will implement all possible conservation measures, and (2) where the Governor can mandate conservation measures, that he do so in addition to granting relief under Section 110(f). If he cannot mandate conservation measures he would be required to ask for voluntary conservation measures in the areas affected. If conservation measures would be adequate by themselves, no declaration involving 110(f) would be appropriate.

B. Specific reference to Section 303 emergency powers:

EPA should recommend that the President specifically mention the continued responsibility of the EPA to take action under Section 303 of the Clean Air Act where air pollution may result in an imminent and substantial endangerment to human health. Although Section 303 would not be suspended in any event, a specific reference will help to ensure that State as sources are on not of EPA's intention to monitor the

potentially severe health impacts of any increases in emissions resulting from SIP suspension.

C.Reference to possible case by case disapproval by EPA:

This is necessary to impress upon States the need to make case by case findings as required by Section 110(f). If this is not done at the State level, EPA should disapprove wherever it determines that the Governor could not have made the necessary

findings for the source. (For example, suspensions of compliance schedules would generally be inappropriate since they would be unlikely to alleviate any unemployment or residential energy loss.)

D.Limitations on time and area covered by emergency declaration:

EPA should recommend that emergency declarations be as precise as possible, especially as to the area affected, to allow both an adequate response to true emergencies and an adequate opportunity to reevaluate the situation as events develop.

III.EPA Response to SIP Suspensions Issued by Governors under Section 110(f) of the Clean Air Act

A.Public hearings:

We strongly urge that, whenever possible, the Regional Office actively participate in any public hearing held under 110(f). EPA's participation will be useful for two reasons. First, it will help ensure that the public health impacts of alternative mitigative measures will be considered in the decision making process. Second, it will give us the opportunity to establish on the record early in the process that blanket SIP suspensions throughout a State may not be acceptable and that the findings required by Section 110(f)(2)(A) and (B) of the Act must be made for each source to be covered by the suspension. Therefore, Regional Offices should testify generally that EPA recognizes and will cooperate in attempting to ease the impact of fuel shortages but that, because health problems which could result from suspending air quality standards are a grave concern, suspensions should not be granted lightly. The spokesperson should also advise that temporary emergency basis and only where the findings required by Section 110 (f)(2)(A) and (B) have been made.

The purpose of the public hearing required in Section 110(f) is, in part, to provide a factual record for the Governor and EPA to use in determining whether temporary suspension of portions of the implementation plan are justified. As a minimum, the public hearing should cover the following:

- (1) the nature and extent of the energy emergency;
- (2) current and projected unemployment impacts associated with the energy emergency;
- (3) current and projected loss of necessary energy supplies for residential use associated with the energy emergency;
- (4) alternative strategies for reducing the adverse impacts of the energy emergency and the consequences of these strategies on unemployment and on residential energy supply;
- (5) amount of energy savings expected to result from temporary suspension of portions of the implementation plan;
- (6) to the extent possible, pollutant emission levels both before and after the proposed temporary suspension of portions of the implementation plan; and
- (7) to the extent possible, preliminary assessment of the air quality and health effect impacts of the proposed temporary suspension of portions of the implementation plan.

Information provided on items (5) through (7) should, whenever possible, include source by source data for those sources which, because of their location, the nature and quantity of their emissions, the density of population in the area, or other reasons, we might reasonably anticipate would have an unacceptably adverse impact on public health should they be included under a temporary suspension determination.

Because of the emergency nature of this process, it is unlikely that the public will be given much notice (probably less than one week) prior to a hearing. Accordingly, it will be useful for those Regions likely to be affected to begin to prepare a position on SIP suspensions on a priority basis for each State within the Region. Efforts should begin immediately to evaluate possible adverse air quality impacts within States expected to initiate the Section 110(f) process as soon as necessary. Clearly, any air quality analyses done as part of this effort will be cursory and can only be intended to begin a screening process. Unless recent atmospheric dispersion modeling analyses for particular areas or sources has been done for other reasons, simple rollback (roll forward) estimates will have to suffice for projecting air quality impacts. Areas should be screened on the basis of recent ambient monitoring data and further on the basis of alert episode days. Source impacts should be screened on the basis of size, degree and reliance on affected fuel, emission density, stack heights, etc.

The general purpose of this analysis is to identify those specific areas or particular sources where a suspension of the SIP would be most likely to have severe air quality impacts and resultant severe public health effects. It would be most desirable to

coordinate this effort to the maximum extent possible with the appropriate State agency since the State will make the initial decision on the case-by-case SIP suspensions.

B.Regional Responsibilities Following SIP Suspensions

Decisions:

The Regional Office should maintain a current listing of all individual sources that are granted a suspension on a day-to-day basis. Each source granted a suspension should be contacted by the Regional office to determine the specific course of action which the source intends to take in response to the suspension. Such information will facilitate a better assessment of the potential air quality impacts that can be expected.

The Regional office should ensure that every effort is made to process at least daily data from all available ambient monitoring networks in and around those areas where SIP suspensions have been granted. To the extent that resource constraints limit this effort, highest priority should be placed on those areas that are most likely to reach episode levels based upon historical ambient air quality and the number, concentration, and size of sources granted SIP suspensions in the area. The Regional office should notify the Division of Stationary Source Enforcement (DSSE) and the Office of Air Quality Planning and Standards (OAQPS) when air pollution concentrations in areas affected by SIP suspensions are exceeding dangerous levels (i.e., episode alert levels and higher). It is likely that timely air quality monitoring data will provide the single most important basis for supporting a determination by the Administrator to take an emergency action under Section 303 of the Clean Air Act or to recommend that the President rescind or not extend his emergency declarations for a specific area.

The EPA Administrator may disapprove a suspension issued by a Governor only in those limited situations in which the suspension does not meet the requirements of Section 110 (f)(2)(a) and (B) of the Clean Air Act (i.e., where high levels of unemployment and loss of necessary energy supplies for residential dwellings cannot do not exist or the unemployment or loss cannot be totally or partially alleviated by the suspension). In order to assure that suspension apply only to sources experiencing an emergency, EPA should act quickly to disapprove suspensions coverings sources for which the necessary findings cannot be made. The authority to disapprove suspension should be delegated to the Regional Administrators with EPA headquarters concurrence, in order to assure expedited action. (A delegation of Section 110(f)(3) authority is included in the attached memorandum to the Regional Administrators for your signature.)

Regional Offices should give high priority to reviewing any actual suspension issued by Governors to assure that they are consistent with the criteria set forth in Section 110(f)(2)(A) and (B). Review should focus on sources in those areas (and, where known, major sources) for which DOE has determined, based on available supplies and

possible interconnections, that the emergency is less critical. DS will keep the Regional Offices informed of DOE's determinations and will request DOE determinations as necessary to enable Regional Offices to set proper priorities for reviews of SIP suspensions.

The memorandum attached for your signature directs each Regional Administrator to designate a contact for energy emergency information. DSSE's Regional Programs Section will contact Regional Office designees each day to obtain information for inclusion in a daily status charts. DSSE will be primarily responsible for contacting the Regional Offices to request specific information, for answering any Regional questions, and, for receiving and disseminating necessary data to appropriate Regional and headquarters Offices.

IV.EPA Response to Inquiries from States and Sources

Generally, inquiries can be expected to fall within the categories listed below. Suggested Regional Office responses are indicated.

A.Source inquiries about possible suspension of State promulgated implementation plan:

Response: Only the Governor can suspend such a SIP. Source may petition Governor to petition the President for a 110(f) emergency declaration. EPA will not concur in relaxation of environmental regulations prior to a declaration under 110(f).

B.Source inquiries about possible suspension of federally promulgated SIP:

Response: The President has not delegated his authority to suspense such SIP. Sources may direct petitions to the President but should send copies to the Administrator and Regional Administrator to assure quick response. Source must present information to allow the President to determine: (1) that an energy emergency exists in the vicinity of the source of such severity that a temporary suspension of any part at the SIP may be necessary and other means of responding may be inadequate; (2)

that there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and (3) that such less or unemployment can be totally or partially alleviated by SIP suspension. (DSSE should be notified immediately of an expected petitions for suspension of federally promulgated SIP's.)

C. Source or State inquiries about possible suspension of non- SIP federal air pollution control requirements (e.g., New Source Performance Standards, interim requirements

in Federal orders or consent decrees, etc.):

Response: There is no statutory authority for emergency suspension of non-SIP requirements, since 110(f) relates only to SIP's. If, however, a determination of a necessary has made under 110(f) relative to SIP's, EPA will exercise enforcement discretion on a case-by-case basis in dealing with non-SIP situations. Where the findings necessary for a SIP suspension could not have been made in a specific case, EPA will enforce the applicable requirements and will seek appropriate penalties. Where those findings could be made for a source subject to non- SIP federal requirements, EPA will generally refrain from enforcing or seeking penalties based on a source's noncompliance where all other possible steps are being taken to comply and when violation results from efforts to minimize the impacts of an emergency on high levels of unemployment or loss of necessary energy supplies to residences. A commitment not to enforce may be made only in writing to a specific source and only with the concurrence of the Division of Stationary Source Enforcement. In no event may source be exempt from possible action under Section 303 of the Clean Air Act. It is unlikely that any relaxation of incremental compliance schedules will be appropriate.

D.Source or State injures about suspension of federal requirements for water pollution control:

Response:If, based on the provision of Section 110(f) of the Clean Air Act, a proclamation is made and petitions for relief from NPDES requirements are received, the Regional Office should immediately contact the Office of Water Enforcement for guidance. The following conditions for temporary modification of individual discharge permits will generally apply:

1. On a case-by-case basis, EPA will review written Applications for relief from individual permit conditions to determine:
 - a. the specific permit conditions which the discharge wishes to have amended temporarily;
 - b. the specific energy savings from each suspension of water treatment activity;
 - c. additional steps the permittee is taking to reduce total plant energy consumption; d. the anticipated environmental damage which will result from the cessation of all or portions of the treatment process;
 - e. other area wide energy conservation measures.
2. Except where a balancing test would dictate a contrary result, written requests will be

disapproved if they petition for relief from the following:

- a. a requirement which, if suspended, would result in short-term suspension of current treatment activity and which would result in long-term environmental damage;
- b. a requirement limiting the discharge of toxic substances (NRDC, etc.)
- c. the construction steps which are in their compliance schedules; d. disinfection requirements where water is used for swimming or food processing, etc.

In all cases, relief may be granted using prosecutorial discretion and the Regions will issue legally enforceable discretion and the Regions will issue legally enforceable documents which require full compliance at the end of the emergency period. These documents will also require increased levels of monitoring and reporting in order to safeguard the environment.

V. Recommendation

We recommend that you sign the attached memorandum to the Regional Administrators which emphasizes the EPA's response to an emergency must be handled as the highest Agency priority.

Marvin B. Durning David G. Hawkins

Attachments

cc: DOE, attn: Ms Yvonne Allen

UNITED ENVIRONMENTAL PROTECTION AGENCY WASHINGTON, D.C.
20460

JULY 2, 1979

MEMORANDUM

TO: Regional Administrators, Regions I-X

SUBJECT: Supplement to the Memorandum of March 6, 1979,
Regarding Implementation of Section 110(f) of the Clean Air Act

On March 6, 1979; I sent to the Regional Administrators guidance on implementing Section 110(f) of the Clean Air Act. Since that time headquarter's staff has clarified the

informational requirements for adequately addressing Section

110(f) issues and has also developed a policy concerning the use of price differentials between low and high sulfur fuel oils in Section 110(f) proceedings. Each Regional Administrator should take action to implement the supplemental guidance and recommendations set forth in the attached memorandum to me from Mr. Durning and Mr. Hawkins.

I have designated Mr. Paul Stolpman (phone: 426-2482) as the headquarters contact on the analysis needed to support all 110(f) actions. Mr. Stolpman's alternate is Mr. George Sugiyama (phone: 426-2482). Action on the 110(f) applications remains as set forth in previous guidance.

Douglas M. Costle

Attachment

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